Medical Quality Assurance (BMQA) filed an accusation against Respondent seeking to suspend his medical license. Following an administrative hearing, on July 24, 1989, the state administrative law judge recommended that Respondent's medical license be revoked, but that the revocation be stayed for five years, that Respondent be placed on probation subject to certain conditions, and that he be suspended from the practice of medicine for 90 days. After the BMQA adopted the decision of the state administrative law judge, Respondent sued BMQA, but was unsuccessful both in the lower court and on appeal. The court subsequently fined Respondent $10,000, and found that his appeal was frivolous.

On June 21, 1989, DEA issued an Order to Show Cause, seeking to revoke Respondent's prior DEA Certificate of Registration, AL0033186. Respondent requested a hearing, but later submitted a written statement of his position in lieu of participating in a hearing. Based on Respondent's statement and the Government's investigative file, effective August 17, 1990, the then-Acting Administrator revoked Respondent's DEA registration, based upon the finding that his continued registration would be inconsistent with the public interest. *See Robert A. Leslie, M.D.,* 55 FR 29278 (1990). Respondent subsequently filed a new application for DEA registration on February 6, 1992, which is the subject of this proceeding.

Respondent testified at the administrative hearing to matters surrounding his criminal conviction. Respondent argued that his prescribing to undercover operatives was justified based upon their physical conditions and complaints of pain, and that he was entrapped; during the criminal trial, the operatives perjured themselves regarding events that took place during their visits with Respondent; his direct appeal of his criminal convictions was denied, and his subsequent filing of ten petitions for habeas corpus in state and federal courts were unsuccessful; and, he sued his attorney for malpractice based upon the latter's failure to provide adequate legal representation.

Respondent also contended that the 1990 final order of the then-Acting Administrator relied on false statements supplied by BMQA that were not part of the original court record. Respondent testified that he filed a petition for reconsideration of that final order, however, since the **Federal Register** notice of the final order was not timely sent to him, the period for filing a motion for reconsideration elapsed before he became aware of the revocation. The administrative law judge found this argument without merit based on the provisions of 21 U.S.C. 877, regarding judicial review, and the fact that there is no provision in the Code of Federal Regulations for filing requests for reconsideration.

Pursuant to 21 U.S.C. 823(f), the Deputy Administrator may deny any application for registration, if he determines that the continued registration would be inconsistent with the public interest. In determining the public interest, the following factors are considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

It is well established that these factors are to be considered in the disjunctive, i.e., the Deputy Administrator may properly rely on any one or a combination of the factors and give each factor the weight he deems appropriate. *See Henry J. Schwarz, Jr., M.D.*, Docket No. 88–42, 54 FR 16422 (1989). In considering whether grounds exist to deny Respondent's application for DEA registration, the administrative law judge found all of the above factors relevant.

The administrative law judge found that Respondent's testimony, documentary evidence and pleadings in this proceeding contended that his criminal conviction was invalid. The administrative law judge concluded however, that the conviction is res judicata, and that Respondent should not be allowed to relitigate the matter.

The administrative law judge found that during the administrative hearing, although Respondent was free to offer new evidence that he would never again engage in the type of conduct that resulted in his conviction, he failed to do so. The administrative law judge also found that while Respondent offered evidence and expended time arguing the invalidity of his criminal convictions, he offered no evidence of remorse for his prior conduct, that he has taken rehabilitative steps, or that he recognizes the severity of his actions. The administrative law judge concluded that Respondent is either unwilling or unable to discharge the responsibilities inherent in a DEA registration, and therefore, recommended that his application for DEA registration be denied.

The Deputy Administrator having considered the entire record adopts the administrative law judge's findings of fact, conclusions of law, and recommended ruling in its entirety. Accordingly, the Deputy Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b) and 0.104, hereby orders that the application for registration, executed by Robert A. Leslie, M.D., be, and it hereby is, denied. This order is effective March 15, 1995.

Dated: March 8, 1995.

**Stephen H. Greene,**

*Deputy Administrator.*

[FR Doc. 95–6297 Filed 3–14–95; 8:45 am]

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## DEPARTMENT OF LABOR

### Pension and Welfare Benefits Administration

**[Prohibited Transaction Exemption 95–24; Exemption Application No. D–09787, et al.]**

### Grant of Individual Exemptions; Boston Cement Masons Union Local No. 534 Deferred Income Plan, et al.

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Grant of individual exemptions.

**SUMMARY:** This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the **Federal Register** of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, DC. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of

the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

**Statutory Findings**

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

**Boston Cement Masons Union Local No. 534 Deferred Income Plan (the Deferred Income Plan), Boston Cement Masons Union Local No. 534 Pension Plan (the Pension Plan), Boston Cement Masons Union Local No. 534 Health and Welfare Plan (the Welfare Plan) and Boston Cement Masons Union Local No. 534 Apprenticeship Plan (the Apprenticeship Plan; Collectively, the Plans) Located in Boston, Massachusetts**

**[Prohibited Transaction Exemption 95–24; Application Nos. D–9787, D–9788, L–9789 and L–9790, respectively]**

*Exemption*

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code, shall not apply to the proposed leasing of office space in a building (the Building) owned by the Deferred Income Plan to the Boston Cement Masons Union Local No. 534, a party in interest with respect to the Deferred Income Plan.

In addition, the restrictions of section 406(b)(2) of the Act shall not apply to the proposed leasing of office space in the Building by the Deferred Income Plan to the Pension Plan, the Welfare Plan and the Apprenticeship Plan.

This exemption is conditioned upon the following requirements: (1) The terms of all such leasing arrangements are at least as favorable to the Plans as those obtainable in an arm's length transaction with an unrelated party; (2) an independent, qualified fiduciary, who has approved of the leasing arrangements, agrees to monitor all leases on behalf of the Deferred Income Plan as well as the terms and conditions of the exemption at all times; (3) the rental charged by the Deferred Income Plan under each lease is based upon the fair market rental value of the premises as determined by an independent, qualified appraiser; (4) the Building is revalued annually by the independent, qualified appraiser; (5) if appropriate, the independent, qualified fiduciary adjusts the rentals charged for the office space based upon the annual appraisals of the Building; and (6) the trustees determine that the leasing arrangements are in the best interests of the Pension Plan, the Welfare Plan and the Apprenticeship Plan.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on January 18, 1995 at 60 FR 3659.

**FOR FURTHER INFORMATION CONTACT:** Kathryn Parr of the Department, telephone (202) 219–8971. (This is not a toll-free number.)

**General Motors Hourly-Rate Employes Pension Plan (the Plan) Located in Detroit, Michigan**

**[Prohibited Transaction Exemption No. 95–25; Application No. D–9734]**

*Exemption*

The restrictions of sections 406(a), 406(b)(1) and (b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code [1] shall not apply to:

(1) The transfer of shares of Class E common stock (the Class E stock) of General Motors Corporation (GM) to the Plan through the in-kind contribution of such shares by GM, a party in interest with respect to such Plan;

(2) The holding of the Class E stock by the Plan;

(3) The sale for cash of shares of Class E stock by the Plan to GM or its affiliates or to certain defined contribution plans sponsored by GM or its affiliates;

(4) The exchange of shares of Class E stock for publicly-traded securities between the Plan and GM or its affiliates under the same terms and conditions as are made available to all shareholders of Class E stock; and

(5) The acquisition, holding, and exercise by the Plan of a put option granted by GM which permits the Plan to sell the Class E stock or a successor security for which the Class E stock has been exchanged to GM.

This exemption is conditioned upon the satisfaction of the following requirements:

(a) GM contributes to the Plan at least 177 million shares of Class E stock but no more than 186 million shares plus $4 billion in cash, with at least $2 billion contributed in conjunction with or prior to the contribution of the Class E stock, and the remaining $2 billion contributed no later than September 30, 1995;

(b) If less than 177 million shares of Class E stock are contributed, GM will contribute additional cash in an amount equal to the difference between 177 million and the number of shares of Class E stock contributed times the per-share value of such stock at the time of contribution, or a weighted average price if such stock is not contributed on a single date;

(c) United States Trust (UST), an independent qualified fiduciary, or a successor independent fiduciary acceptable to the Pension Benefit Guaranty Corporation (PBGC) represents the Plan's interests with respect to the acquisition of Class E stock and also will serve as trustee of the Plan with sole discretion respecting the management and disposition of the Class E stock after the acquisition. UST must determine, prior to entering into any of the transactions described herein, that each such transaction, including the contribution of the Class E stock, is in the interest of the Plan;

(d) UST negotiates and approves the terms of any of the transactions between the Plan and GM or its affiliates or certain defined contribution plans sponsored by GM or its affiliates;

(e) UST manages the holding and disposition of the Class E stock and takes whatever action it deems necessary to protect the rights of the Plan;

(f) The terms of any of the transactions between the Plan and parties in interest are no less favorable to such Plan than terms negotiated at arm's length under similar circumstances with unrelated third parties;

(g) A credit balance reserve is maintained in the Plan consisting of the cash credit balance or cash generated from stock that has been sold in an amount equal to at least 25 percent

[1] For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(25%) of the contributed value[2] of the Class E stock which remains unsold in the Plan, for so long as such stock or any securities received in exchange exceeds the percentage limitations described in sections 407(a) and 407(f) of the Act (the ERISA Limits);

(h) An independent qualified appraiser determines the fair market value of the Class E stock contributed to the Plan as of the date of such contribution, and determines the fair market value of the Class E stock at various other times as required under the agreement between GM and the PBGC (the Agreement);

(i) With respect to any sale or exchange of Class E stock by the Plan to GM or its affiliates or to any defined contribution plans sponsored by GM or its affiliates, no commission will be charged to or paid by the Plan;

(j) Any sale or exchange of Class E stock between the Plan and GM or its affiliates will be for no less than ''adequate consideration'' within the meaning set forth in section 3(18) of the Act, and any sale of Class E stock by the Plan to a defined contribution plan sponsored by GM or its affiliates will be at the prevailing price for such stock on the New York Stock Exchange (NYSE); and

(k) The Plan incurs no fees, costs, or other charges or expenses as a result of its participation in transaction (1), above and, with regard to other transactions described herein, will not incur fees and other costs payable by the issuer under the Registration Rights Agreement (RRA).

**EFFECTIVE DATE:** This exemption will be effective on March 13, 1995.

*Written Comments*

In the Notice of Proposed Exemption (the Notice), the Department invited all interested persons to submit written comments and requests for a hearing on the exemption. All comments and requests for hearing were due by December 29, 1994.

The Department received 157 letters from interested persons commenting on the exemption. In addition, a number of interested persons telephoned the Department. These individuals were assisted with their questions by members of the staff of the Office of Exemption Determinations of the Department. With respect to all the written comments submitted by interested persons, the Department forwarded copies to the applicant and requested that the applicant address the concerns raised by the commentators in writing. A description of the comments and the applicant's responses are summarized below.

Several of the written comments received by the Department supported adoption of the exemption. In this regard, after review of GM's application for exemption and the terms of the Agreement between GM and PBGC, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (the UAW), the certified collective bargaining representative for approximately 215,000 employees of GM who are participants in the Plan and approximately 255,000 retired former employees of GM who are participants in the Plan, expressed support for the application and stated its belief that the transactions which are the subject of this exemption are in the best interest of the Plan's participants and beneficiaries.

Some commentators neither supported nor opposed the exemption but either expressed a lack of understanding of the exemption or raised other concerns that are beyond the scope of this exemption proceeding. Other commentators opposed the exemption and raised questions and concerns regarding the transactions described therein. The concerns expressed by these commentators generally related to: (a) The impact on pension or health benefits; (b) the holding by the Plan of more than 5% of its assets in any company; (c) the preference for a cash contribution over that of stock; (d) the potential loss of value of the Class E stock; (e) the restrictions on the Plan's ability to sell the Class E stock under the terms of the RRA; (f) the fact that the Class E stock is not a qualifying employer security; (g) the control by the Plan of more than 10% of the voting shares of a company; (h) the presence of a financial flexibility exception in the Agreement given GM's recent financial history; (i) the effect of an EDS sale on GM's future contributions to the Plan; (j) the tax advantages to GM of the contribution of Class E stock; and (k) the lack of a mandatory requirement in the exemption to convert the Class E stock into cash.

The following summarizes the response to these concerns submitted to the Department by GM. With respect to (a) above, GM states that the exemption does not change or affect in any way the pension benefits payable under the Plan or health benefits for active or retired employees. As a result, the exemption will not affect a participant's eligibility to receive a pension benefit, the amount of a pension benefit check, or the terms of any health care plan.

With respect to (b), GM states that UST, the independent fiduciary, has represented that the Plan's receipt of the Class E stock will not violate the general diversification rule of the Act, which requires that a plan's assets be sufficiently diversified in order to minimize the risk of large losses.

With respect to (c), GM responded that while in the abstract the contribution of cash may be superior to that of stock, the issue posed by the exemption application was not whether the Plan could choose to acquire Class E Stock where an equivalent value of cash is available. In this regard, as the Plan is significantly underfunded, GM believes it is offering a way to substantially improve the Plan's funding with a combined contribution of Class E stock and cash.

With respect to (d), GM maintains that the Agreement, deferring credit for the contribution of Class E stock and the $4 billion in cash, provides considerable security because in all likelihood the Plan will receive further cash contributions from GM in excess of minimum funding rules of the Act in the years between 1995 and 2003. In addition, GM states that the Agreement contains other protective features that adequately address the potential for future losses in value, if any, in the Class E stock. Finally, because the dividends on Class E stock are based on the earnings of Electronic Data Systems Corporation (EDS), GM believes the contribution provides more diversification than a security whose dividends are based on the performance of GM.

With respect to (e), GM states that UST, the independent fiduciary, is required by law to act solely in the interest of the Plan and its participants and beneficiaries. In this regard, UST is satisfied that, given the size of the block and the likely means of disposition, that the RRA affords ample opportunity for UST to sell or otherwise dispose of the Plan's Class E stock while maximizing the value of such stock to the Plan.

With respect to (f), GM states that although the Class E stock is not a qualifying employer security because the Plan will acquire and hold in excess of the limits imposed by the Act, there are sufficient safeguards to protect the interest of the Plan and the participants and beneficiaries. In addition, GM points out the Class E stock is widely traded on the NYSE, and an independent fiduciary, UST, has negotiated a RRA that will allow it, as trustee for the Class E stock, to dispose

[2] Contributed value means the value of the Class E stock when contributed to the Plan, as determined by Duff & Phelps Capital Markets Co. (formerly Duff & Phelps Financial Consulting Co.).

of the stock efficiently while maximizing its value to the Plan.

With respect to (g), GM states that the Class E stock is widely traded on the NYSE and generates dividends based on the earnings of EDS rather than on the performance of GM. Further, an independent fiduciary, UST, has negotiated a RRA that will allow UST, as trustee for the Class E stock, to dispose of the stock efficiently while maximizing its value to the Plan, and UST is satisfied that it can do so given the size of the block of Class E stock.

With respect to (h), GM states that the commentator erroneously alleges that GM's North American Operations (the NAO) has met the ''bad year'' definition under the Agreement in each of the past five (5) years and asserts that this pattern will continue in the future, allowing GM to access more of the credit balance than ''what would appear to the common layperson.'' In fact, the NAO did not meet the ''bad year'' definition in 1994. Moreover, GM notes that, although the proposed exemption is complex, the Department's notice and comment process is fair and comprehensive and the financial flexibility provisions of the Agreement in principle were disclosed in the Notice on the same basis and in the same fashion as all other parts of the exemption transaction.

With respect to (i), GM states that the commentator erroneously concludes that if GM sells EDS, GM's obligation to contribute to the Plan will be nullified. In this regard, GM represents that the Agreement provides that the credit balance rules generally apply to stock for which the Plan's Class E stock has been exchanged. Further, GM asserts that if the credit balance is unavailable, GM will still make at least the minimum contributions required by the Act.

With respect to (j), GM states that the contribution of Class E stock to the Plan does not defer or eliminate any income taxes that otherwise would be payable on GM's disposition of Class E stock. With respect to (k), GM states that the commentator erroneously assumes that GM will have control of the Plan's portfolio after the Class E stock is contributed. In this regard, GM represents that it will have no control over the management of such stock. UST, the independent trustee, will have complete discretion over the management and disposition of the Class E stock, and, in its sole discretion, will determine how and when the Class E stock will be liquidated.

In addition to the comments described above, the Department also received comments from the applicant, GM. The comments from GM requested certain modifications and clarifications to the exemption as proposed and to the Summary of Facts and Representations (SFR). GM's comments fall into three categories: (1) clarification regarding the relationship of the exemption to the Agreement between the PBGC and GM regarding the contribution of cash and Class E stock; (2) issues relating to the conditions of the exemption; and (3) certain technical corrections to the SFR.

With respect to the first category of the comment, GM informed the Department that, since May 1994, GM and the PBGC have been negotiating the terms of a definitive Agreement. In its application for exemption, GM described the tentative terms of this Agreement, as reflected in an agreement in principle (the AIP) executed on May 9, 1994, between the PBGC and GM. The Department summarized certain terms of the AIP in the SFR. The proposed exemption provided that any final exemption would be conditioned upon adherence to the material facts and representations described in the SFR. GM notes that the terms of the AIP have now been superseded by the executed Agreement. Thus, GM believes that there is a substantial risk that any change in or non-adherence to a material provision will vitiate the exemption and, thereby, preclude the Plan from continuing to hold contributed Class E stock above the limits set forth in sections 407(a) and 407(f)(1) of the Act. This situation in turn would place the independent fiduciary, UST, in the position of potentially having to engage in a forced liquidation of a sufficient quantity of Class E stock to bring the Plan within the limits of such sections of the Act. As a result, GM requests clarification as to whether any change in or non-adherence to either the terms of the AIP, as described in the SFR, or the Agreement would render the exemption unavailable.

GM states that the Agreement is a contract between GM and the PBGC. It is lengthy and complicated, reflecting the nature, size, and complexity of its subject. Assets likely to be valued in excess of $10 billion will be at issue, and the terms of the Agreement will require numerous complex calculations to be performed. The Agreement will continue in force until at least October 1, 2003, and, as with any such complex document, it is possible that good faith differences may arise between GM and the PBGC over the meaning and application of its terms.

GM notes in its comment that it believes that the Plan is fully protected by the reporting and enforcement provisions set forth in the Agreement, and the interests of the Plan and its participants and beneficiaries are better served by application of such procedures than by enforcement through the exemption. These reporting and enforcement provisions are carefully crafted to facilitate the timely and effective resolution of disputes, while permitting the Plan to continue the orderly disposition of Class E stock. The Agreement provides for annual reporting by GM to the PBGC, and contains a dispute resolution mechanism through which the PBGC can enforce the terms and conditions of such Agreement. GM represents that it will comply in all material respects with the reporting provisions in the Agreement (including as they may be changed from time to time by mutual agreement of GM and the PBGC). In addition, the Agreement provides, among other things, for access to the courts, and under certain circumstances, for the posting of collateral by GM if a disputed amount exceeds a certain threshold. Accordingly, GM suggests that the exemption, if granted, contain the following language, ''Several aspects of the Agreement are of special importance to the Department and were included as requirements (a), (b), and (g) of the proposed exemption * * *. Accordingly, if GM violates a term or condition of the Agreement, *other than the specific requirements noted above* (emphasis added), the violation will be addressed by PBGC under the Agreement and not by withdrawal or other invalidation of the exemption itself.''

In this regard, the Department requested the views of the PBGC concerning whether a breach of the Agreement by GM in the future should void the exemption. The PBGC confirmed that the Agreement contains adequate enforcement mechanisms in the event of a breach. GM is required under the Agreement to provide information to the PBGC that will enable the PBGC to monitor and confirm that the restrictions have been properly applied. Also, the PBGC will monitor and enforce those terms of the Agreement adopted by the Department as conditions of the exemption, as summarized in sections (a), (b), and (g) therein. As a result, the PBGC stated that it does not believe that voiding the exemption is a necessary or appropriate enforcement mechanism to ensure compliance with the Agreement, and that it would not recommend that the exemption be voided for violation of a term of the Agreement after GM has contributed the stock and cash required by the Agreement and by sections (a)

and (b) of the proposed exemption. In addition, the PBGC is of the opinion that voiding the exemption after the stock is contributed could harm the Plan if the independent fiduciary were forced to sell stock held by the Plan to bring the Plan's employer securities within the ERISA Limits.

UAW in its comment letter also concurred with the views expressed by GM on the question of whether the exemption should be voided in the event of an alleged breach of the Agreement. UAW believes that the enforcement mechanisms described in the Agreement are adequate and appropriate and that termination of the exemption in the event of a breach of that Agreement would only be harmful to participants and beneficiaries, in that termination of the exemption would by necessity force a massive and precipitous sale of the Class E stock. In the opinion of the UAW, selling the Class E stock under such conditions is not likely to result in the realization of optimum proceeds and would therefore diminish the assets in the Plan.

However, the UAW noted that the language suggested by GM to address this issue, as quoted above, would create the impression that these requirements of the exemption are precisely co-extensive with the analogous sections of the Agreement. The UAW further noted that the language in (a), (b), and (g), as set forth in the Notice, summarized but did not recite word for word such sections from the Agreement. Accordingly, the UAW suggested that the word, ''included'' in the first sentence of GM's language quoted above be replaced with the word, ''summarized,'' and the underlined portion of the second sentence of GM's language quoted above be changed to read, ''without violating one of the express conditions of the exemption.''

The Department concurs with GM, the PBGC, and the UAW that the rights embodied in the reporting and dispute resolution provisions of the Agreement provide protection to the Plan, and that enforcement by the PBGC through the procedures negotiated in the Agreement will serve the interest of the Plan and its participants and beneficiaries. Further, the Department believes that any ''fire sale'' of Class E stock which may result from the unavailability of the exemption through a change in or non-adherence to the terms of the AIP described in the SFR or the Agreement would not be in the interest of the Plan. However, the Department has determined that compliance with certain provisions of the Agreement, as summarized in paragraphs (a), (b), and (g) of the proposed exemption, are important and necessary to the continued availability of the exemption. Accordingly, it is the view of the Department that, if GM violates a term or condition of the Agreement, without violating one of the express conditions of the exemption, the violation will be addressed by the PBGC in accordance with the enforcement terms of such Agreement and will not result in the unavailability of the exemption. The Department is of the further view that the exemption will be available despite the fact that the terms of the final Agreement differed in some respects from the terms of the AIP which was summarized in the SFR.

With respect to the second category of the comment, GM requests modifications to the language of certain conditions of the exemption, as set forth in the Notice. In this regard, condition (c) on page 56541 and repeated in item 18(c) on page 56549 of the Notice as published in the **Federal Register**, states: ''United States Trust (UST), an independent qualified fiduciary, or a successor independent fiduciary acceptable to the Pension Benefit Guaranty Corporation (PBGC) represents the Plan's interests *for all purposes with respect to the Class E stock and determines* (emphasis added), prior to entering into any of the transactions described herein, that each such transaction, including the contribution of the Class E stock, is in the interest of the Plan.'' GM believes this to be an overly broad description of the independent fiduciary's responsibilities. GM suggests striking the underlined phrase above and substituting in lieu thereof, ''with respect to the acquisition of Class E stock and also will serve as trustee of the Plan with sole discretion respecting the management and disposition of the Class E stock after the acquisition. UST must determine * * *.'' The Department concurs with this comment and has modified the final exemption accordingly.

Condition (k) on page 56541 and repeated in item 18(k) on page 56549 of the Notice, as published in the **Federal Register**, states: ''The Plan incurs no fees, costs, or other charges or expenses as a result of its participation in *any of the transactions* (emphasis added).'' GM is concerned that this condition would preclude the payment by the Plan to UST or any other independent fiduciary of fees for asset management services as independent fiduciary. In this regard, the applicant notes that the application indicated that GM would bear the costs of UST's fees in connection with the Plan's acquisition of the Class E stock but that fees for UST's trustee services will be payable by the Plan. It is intended that all fees associated with the management and disposition of Class E stock, other than certain underwriting and other fees and costs described in section 9 of the RRA, will be borne by the Plan. GM suggests striking the underlined phrase above and substituting the phrase, ''transaction (1), above and, with regard to other transactions addressed herein, will not incur fees and other costs payable by the issuer under the Registration Rights Agreement.'' The Department concurs with this comment and has revised the language of condition (k).

With respect to the third category of the comment, GM believes that certain revisions to the SFR would more accurately describe the transactions. As mentioned above, the AIP was summarized in the SFR. Subsequently, the AIP was superseded by the terms of the Agreement. Consequently, GM wishes to point out the following four (4) provisions of the AIP which were summarized in the SFR but which have now been modified by the Agreement.

The second sentence of item 6 of the SFR on page 56543, states that GM's stock contribution will consist of, ''* * * all of the remaining, 222 million unissued shares of Class E stock less approximately 45 million shares reserved for conversion of GM's Series C Preference Stock, or approximately 177 million shares.'' In accordance with the terms of the Agreement, GM suggests that the phrase, ''and the number of shares of GM Class E stock that, as of the last contribution of such stock, are reserved or committed (as Treasury shares or otherwise) for employee benefit plans, stock bonus plans, or employee stock programs,'' should have been inserted after the words, ''Preference Stock,'' in the above-quoted language.

Item 12 of the SFR, on page 56545 (center column, third full paragraph), refers to GM's ''* * * access annually to an amount of up to $1.5 billion of the stock credit balance generated by the stock which has been sold.'' GM suggests that in accordance with the Agreement the phrase, ''an average of approximately,'' should have been inserted in the above-quoted language between the words, ''to'' and ''$1.5,'' because $1.5 assumes GM's access to the stock credit balance at approximately the mid-point of a plan year and reflects interest over the first portion of the plan year at the Plan's funding standard account rate.

Item 12 of the SFR states on page 56545 (center column, sixth sentence of the second full paragraph) that, the restriction relating to the 25% credit

balance reserve ''* * * will expire on October 1, 2003, if the Class E stock has been exchanged for non-employer securities.'' GM notes that the Agreement provides that, the restriction will expire when the contributed Class E stock or any shares received in exchange therefor no longer exceed the ERISA Limits. If the contributed Class E shares are exchanged for non-employer securities, the restriction will expire on the later of October 1, 2003 or the date on which the Class E stock has been exchanged for non-employer securities.

Item 12 of the SFR states on page 56546 (center column, top carryover paragraph, last sentence) that, ''GM's independent auditor will provide a statement to the PBGC once GM utilizes the financial flexibility provisions described above.'' GM suggests that in accordance with the Agreement, striking the quoted sentence and substituting in lieu thereof, ''[f]or any plan year through the 2002 plan year for which GM utilizes the financial flexibility provisions of the Agreement, GM will include in its submission to the PBGC a statement from its independent auditor confirming the accuracy of the schedule showing GM's cash. In addition, upon request by the PBGC, GM also will furnish for such plan years a report from its independent auditor describing agreed upon procedures it has performed in order to assist the PBGC in evaluating the restructuring charges included in GM's financial statements, if and to the extent those charges were used to determine GM's adjusted net income.'' The Department concurs and notes that the above four (4) clarifications to the SFR are consistent with the terms of the Agreement.

Also, as part of the third category of the comments, GM has suggested the following modifications to the language of the SFR.

In item 5 of the SFR on page 56543 (center column), the first and second sentences in the first full paragraph stated: ''[g]enerally, in order to correct the unfunded liability of its main U.S. plans, GM has revised the mortality assumptions in such plans to more closely reflect recent actual experience. Further, effective for 1993, GM has lowered the asset earnings rate assumption for its main U.S. plans.'' GM points out that the mortality and asset earnings rate assumptions were not adopted in order to correct the unfunded liability of GM's main US plans but rather to accurately reflect recent experience. Accordingly, GM believes that the two sentences quoted above should have read, ''[d]uring 1992, GM revised the mortality assumptions for its main U.S. plans to reflect recent experience and, effective 1993, lowered the asset earnings rate assumption for those plans, to reflect GM's reevaluation of the expected long-term rate of return on Plan assets.'' The Department concurs with this comment.

In item 5 of the SFR on page 56543 (center column) in the first full paragraph, the fourth sentence stated that GM ''* * * will continue to contribute additional amounts above those required in 1994 and future years.'' Although GM anticipates making such contributions, GM suggests that substituting in the phrase quoted above, the words, ''intends to,'' in lieu of the word, ''will,'' and the words, ''1994–1996,'' in lieu of the phrase, ''1994 and future years,'' would have been more accurate. The Department concurs with this comment.

In the third sentence of item 8 of the SFR on page 56543 (right column) GM suggests the underlined word, ''or,'' in the phrase, ''assets remaining after payments to creditors or (emphasis added) to preferred or preference stockholders,'' should have been the word, ''and.'' The Department concurs.

In the first sentence of the first paragraph of item 10 of the SFR on page 56544 (left column), GM suggests that the phrase, ''based upon,'' should have been substituted for ''linked to'' in the sentence, ''[d]ividends on Class E stock are linked to the earnings performance of EDS.'' The Department concurs.

In item 12 of the SFR on page 56545 (center column, first sentence, first full paragraph), GM suggests that the phrase, ''* * * GM has agreed to defer for two (2) years the use of the credit balance * * *,'' should have read, ''GM will defer until 1997 use of the credit balance arising from the contribution (except for interest on the cash portion thereof and as otherwise noted below). * * *'' GM states that because the cash portion of the contribution need not be completed until September 30, 1995, the deferral period could be as short as one (1) year. The Department concurs.

In item 12 of the SFR, in the last clause of the first full sentence in the center column of page 56545, GM suggests that the underlined portion of the phrase, ''* * * to phase in full access by GM to *the credit balance in the Plan's funding standard account,*'' (emphasis added) should have read, ''such credit balance.'' The Department concurs.

In item 16 of the SFR in the first sentence of the first full paragraph in the right column of page 56548, GM suggests, and UST agrees, that in the phrase, ''[b]ecause the marketability and dividends of Class E stock are based on the earnings and financial performance of EDS, UST has reviewed the business of EDS, as well as that of GM,'' the words, ''under the current policy of the GM board,'' should have been inserted before the word, ''dividends.'' The Department concurs.

In footnote 15 on page 56544 (left column), the fourth sentence stated, ''[a]t the discretion of the Board, as appropriate, the number in the denominator from time to time decreases as shares of Class E stock are purchased and increases as shares are needed in order to meet certain requirements of GM's employee benefit plans.'' GM suggests that while the above-quoted statement is correct, in the interest of accuracy and completeness, the following quoted sentence should have been added to the footnote: ''[t]he denominator is subject to adjustment from time to time (but never to a number greater than one) by GM's Board, the discretion of which is limited in accordance with criteria specified in GM's Certificate of Incorporation intended to preserve fairness as between the interests of both the holders of Class E stock and the holders of $1⅔ per value common stock.'' Accordingly, the Department does not object to the inclusion of GM's additional clarifying language.

The following GM comments relate to the RRA and the Transfer Rights Agreement (TRA), as described in the SFR.

GM has commented upon the need of UST to be able to amend the RRA due to circumstances that may arise in the future. In GM's view, the exemption, if granted, should permit UST to execute amendments to the RRA that UST believes are in the interest of the Plan and its participants and beneficiaries, without forcing GM or the Plan to request another exemption. The Department concurs.

Footnote 20 on page 56546, states that the term, ''transfer'' includes an ''offer.'' GM suggests that, to more closely reflect the RRA and TRA, the word, ''offer,'' should have been omitted from the definition of the term, ''transfer.'' The Department concurs.

In the second full paragraph in the right column of page 56546, GM suggests that, to more closely reflect the RRA, it would have been more complete to insert the words ''in the aggregate,'' in the first sentence of the paragraph such that the first sentence would have read as follows: ''It is represented that there will be no limit, except for market considerations on the amount of Class E stock that can be sold *in the aggregate* (emphasis added) pursuant to a 'demand' transfer by the Plan.'' Further,

the word, ''[s]imilarly,'' should have been substituted in lieu of the phrase, ''[i]n addition,'' at the beginning of the third sentence of the paragraph, such that the third sentence should have read as follows, ''*[s]imilarly* (emphasis added), in a negotiated transaction, the Plan may not transfer more than 2 percent (2%) of the outstanding Class E stock to any person or related group. * * *'' The Department concurs.

In the carryover paragraph at the top of the right column on page 56546, GM suggests that, to more closely reflect the RRA, the last sentence should have read, ''[u]nder the RRA, as long as the Plan owns 2 percent (2%) or more of the outstanding Class E stock, the Plan may transfer such stock only under certain terms and conditions summarized in the paragraphs below.'' The Department concurs.

In the second full paragraph in the right column on page 56546, GM suggests that, to more closely reflect the RRA, in the second sentence the adjective, ''reasonable,'' should have been inserted before the phrase, ''best efforts,'' in the sentence, ''However, in any public offering the lead underwriters must agree to use their best efforts to assure that no more than 2 percent (2%) of the outstanding Class E stock is transferred to any person or related group.'' The Department concurs.

In the last paragraph in the right column on page 56546, GM suggests that, to more closely reflect the RRA, the underlined phrases below should have been inserted so that the third sentence should have read as follows, ''[i]f, *at any time that the Plan owns at least 25 million shares of Class E stock* (emphasis added), as a result of such postponements or such market holdbacks, the Plan is not able to effect a 'demand' transfer for a period of thirteen (13) months, *and during such period the Plan has not otherwise transferred 25 million or more shares of Class E stock or had the opportunity to include at least 25 million shares of Class E stock in a piggyback registration* (emphasis added), GM must terminate the postponement within sixty (60) days of the Plan's notification to GM of such fact and take all reasonable actions necessary to effect such transfer.'' The Department concurs.

In the first full paragraph in the left column on page 56547, in the definition of Strategic Partner, GM suggests that to more closely reflect the RRA, the second sentence of the paragraph should have read, ''[a] Strategic Partner is an investor or group of investors acting in concert and designated as such by the Board of GM (or any successor issuer) that acquires 10 percent (10%) or more of the outstanding Class E stock (or securities convertible or exchangeable therefor) in a transaction or series of related transactions intended to achieve a strategic objective.'' The Department concurs.

In the second full paragraph in the left column on page 56547, GM suggests that, to more closely reflect the RRA, the second sentence should have read, ''[i]n a 'piggyback' registration, if GM, in its reasonable judgment, expects that at least 25 percent (25%) of the total number of shares of Class E stock to be included in the offering are shares owned by the Plan, the Plan may select a co-manager reasonably acceptable to GM.'' The Department concurs.

In its comment, GM states that the Plan and a Strategic Partner will participate on an equal, not on a *pro rata* basis in piggyback registrations. Accordingly, GM suggests that, to more closely reflect the RRA, the phrase, ''an equal basis,'' should have been substituted for the phrase, ''a *pro rata* basis,'' in the last sentence of the carryover paragraph in the center column on the top of page 56547. The Department concurs.

In the first full paragraph of the center column on page 56547, GM suggests that, to more closely reflect the RRA, in the first sentence the phrase, ''below 7.5 percent (7.5%) should have read ''7.5 percent (7.5%) or less.'' Further, the fourth and fifth sentences in the same paragraph should have read, ''In general, if a stockholders rights plan is in effect when the third-party tender offer commences but, in connection with such offer, the stockholders rights plan is revoked or invalidated (or the rights issued thereunder are revoked or redeemed) either by GM's Board of Directors or by a final and non-appealable court order, the Plan may tender its shares of Class E stock into such offer. If there is no stockholders rights plan in effect (other than as described above), generally the Plan may tender its shares of Class E stock into a tender offer so long as either the GM Board or at least one-half of the independent directors on the Board have not recommended to stockholders that such tender offer be rejected or there are fewer than the two independent directors on the Board.'' The Department concurs.

In the second full paragraph in the center column on page 56547, GM suggests that, to more closely reflect the RRA, the first sentence should have read, ''[i]n the event the Plan is prohibited as described above from tendering into a third-party offer and GM does not otherwise consent to the Plan tendering, in general, if the tender results in a bidder in the tender offer owning more than 50 percent (50%) of the total combined voting power of all outstanding securities of GM or other issuer, the Plan will have the option to put to GM or other issuer up to the same number of shares that would have been purchased if tendered in the tender offer for a purchase price in cash equal to the price per share offered in the tender.'' The Department concurs.

In item 14 of the SFR, GM suggests that, to more closely reflect the TRA, the first sentence in the second full paragraph in the right column of page 56547 should have read, ''[t]he Transfer Agreement is intended to preserve GM's ability to consummate at a later date a tax-free reorganization, including a split-off in which the Class E stock is converted into or exchanged for shares of capital stock of EDS in a transaction that results in GM no longer controlling EDS ('Split-Off'). In this regard, unless and until a Split-Off is consummated, the Plan will not be permitted to transfer Class E stock if such transfer will result in more than 5 percent (5%) of the total value of Class E stock then outstanding being owned by any foreign person, as defined in the Code.'' The Department concurs.

In the second full paragraph in the right column of page 56547, the third sentence stated, ''[u]nder certain circumstances after the Split-Off, the Plan may not transfer any Class E stock if, as a result, the Plan would own less than 50 percent (50%) of the Class E stock that it owned immediately after it received notice from GM of the Split-Off.'' GM suggests that, to more closely reflect the TRA, the words, ''after the Split-Off'' should not have been included in that sentence and the words, ''a proposed'' should have been inserted in lieu of the word, ''the,'' before the word, ''Split-Off'' the last time it appears.

GM suggests that, to more closely reflect the TRA, the following quoted sentence should have been included as the next to the last sentence in the second full paragraph in the right column of page 56547 of the Notice, ''[f]rom the date of the initial contribution until the first anniversary of the Split-Off, if any, the Plan may not transfer Class E stock to any person or group, if, as a result, such person or group would own 5 percent (5%) or more of the Class E stock then outstanding.'' In addition, GM in its comment provides further clarification regarding the relationship of the above-quoted sentence to the last sentence of the second full paragraph in the right column of page 56547 of the Notice.

That sentence reads, ''[f]rom the date of the initial contribution until the second anniversary of the Split-Off, unless EDS announces a merger with one or more corporations, the Plan may not transfer Class E stock to any person or related group, if, as a result, such person or group would own 5 percent (5%) or more of the Class E stock then outstanding.'' GM states that the two sentences quoted above, when read together, mean that during the period that begins on the initial contribution date and ends on the first anniversary of the Split-Off date, the Plan may not transfer Class E stock to a person who is (or, as a result of the transfer would be) a ''5 percent person.'' However, during the period that begins on the day after the first anniversary of the Split-Off date and ends on the second anniversary of the Split-Off date (or later, in the case of a merger event occurring before the second anniversary of the Split-Off date), the Plan may transfer Class E stock to a person who would, as a result of the transfer, constitute a ''5 percent person,'' if that person agrees to be bound by the TRA. The Department concurs.

In addition, to the comments from GM described above, GM informed the Department of an event which transpired after the Notice was published in the **Federal Register**. In this regard, in item 12 on page 56545 of the SFR, GM indicated that it anticipated contributing $750 million to the Plan before the end of 1994 which, at its option, along with previous cash contributions, could be considered part of the $4 billion dollar contribution which is the subject of this exemption. In this regard, GM, in a letter dated December 22, 1994, advised the Department that this $750 million contribution in cash was made on December 12, 1994.

GM also clarified certain representations regarding the approximately 17 million shares of Class E stock held by the Plan prior to the contribution. On page 56546 of the Notice, in the third full paragraph of the center column, it is stated that the RRA and the TRA ''* * * will apply to all Class E stock held by the Plan whether acquired pursuant to the proposed contribution in-kind or otherwise held by the Plan at the time the exemption is granted. In this regard, the 17 million shares of Class E stock held by the Plan prior to the contribution will be surrendered to GM so that restrictions may be placed on such shares.'' Subsequent to the publication of the Notice, it came to the attention of GM that approximately 300,000 shares of the 17 million shares were acquired on the open market by several independent investment managers in the course of implementing their respective portfolio management strategies. These shares are registered and tradable without restriction. Because these shares are registered, not subject to any trading restrictions, and under management of independent managers, GM believes that it would be inappropriate to transfer management of these shares to UST pursuant to the exemption. Rather, GM believes that these shares should remain under the control of their respective managers to be held and disposed of in their discretion, as they pursue their respective portfolio management strategies. As a result, these shares will not be subject to the RRA and the TRA and will continue under the control of their respective managers, to be held or disposed of in their discretion, rather than UST's.

A number of individual commentators requested a hearing with respect to the exemption. Most of these commentators appear to have requested a hearing because of their belief that the transaction would reduce their retirement benefits. In addition, several commentators requested a hearing but did not state a reason for such request. In response to these requests for hearing, GM states that, given the number of participants and beneficiaries receiving the Notice of Proposed Exemption, the number of requests for a hearing is *de minimis.* Moreover, none of the requests for a hearing presented a compelling reason why such hearing should be held.

The Department has considered the concerns expressed by the individuals who had requested a hearing and the applicant's written response addressing such concerns. After consideration of the materials provided, the Department does not believe that any issues have been raised which would require the convening of a hearing. Further, after giving full consideration to the record, including the comments by commentators and the responses of the applicant, the Department has determined to grant the exemption, as described herein. In this regard, the comments submitted to the Department have been included as part of the public record of the exemption application. The complete application file, including all supplemental submissions received by the Department, is made available for public inspection in the Public Documents Room of the Pension Welfare Benefits Administration, room N–5507, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice published on Monday, November 14, 1994, 59 FR 56541.

**FOR FURTHER INFORMATION CONTACT:** Angelena C. Le Blanc of the Department, telephone (202) 219–8883 (This is not a toll-free number.)

## General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 10th day of March, 1995.

**Ivan Strasfeld,**

*Director of Exemption Determinations, Pension and Welfare Benefits Administration, Department of Labor.*

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